



OFFICE OF ADVOCACY  
U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

October 22, 1999

William E. Kennard, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Regulatory Flexibility Analysis**

Dear Chairman Kennard:

Last week, the Office of Advocacy of the U.S. Small Business Administration ("Advocacy") met with the Federal Communications Commission ("Commission") regarding obligations imposed by the Regulatory Flexibility Act of 1980,<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act<sup>2</sup> (collectively "RFA"). Advocacy was delighted to accept the Commission's invitation to discuss the RFA, issued through its Office of Communications Business Opportunities ("OCBO"), and was gratified at the warm welcome. Advocacy is pleased to be developing a productive relationship with OCBO, which has been responsive of late to Advocacy concerns. Advocacy hopes to inaugurate more cooperative efforts with the entire Commission to achieve full compliance with the RFA.

The RFA is designed to change the culture of rulemaking, to assure that the interests of small business are considered at all stages of the rulemaking process in a substantive way. Advocacy has commented on inadequacies in the Commission's regulatory flexibility analyses. These inadequacies may arise from a misunderstanding of this fundamental purpose of the law and a misconception that the RFA is merely a procedural law rather than one that mandates an analytical process. But through dialogue and patience, we believe that the Commission and Advocacy can achieve better results in the future.

This letter outlines the requirements of the RFA and summarizes topics that Advocacy staff discussed in their meeting with the Commission staff. But Advocacy

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

<sup>2</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

emphasizes that what may appear to be RFA's "procedural hoops" described here, in fact outline the *substantive* considerations the Commission should give to the impact its proposed rules would have on small business, and ways to minimize that impact.

## **1. Initial Regulatory Flexibility Analysis**

When the Commission engages in notice and comment rulemaking, it must prepare an initial regulatory flexibility analysis ("IRFA") to describe and study the impact of the proposed rules on small business.<sup>3</sup> The Commission must describe the purpose, objectives, and legal basis for the proposed rule, and must describe any conflicting rules.<sup>4</sup>

The Commission also must describe the small entities to which a new rule would apply and estimate their number.<sup>5</sup> And the Commission must "assure that small entities have been given an opportunity to participate in the rulemaking".<sup>6</sup> Since this includes direct notification of interested small entities, the Commission should reach out to industry participants.<sup>7</sup> The Commission can make no credible assessment of impact if it does not clearly understand the nature of the parties affected by its rules. The Commission's data regarding the size of regulated companies is often spotty, and the Commission rarely consults other knowledgeable sources to supplement its data.

The Commission should fit its regulations to the size of the industry participants it regulates, and should avoid uniform rules that impose disproportionate burdens on small businesses when less burdensome alternatives would achieve the same objectives. The size of the businesses that a rule affects is important to determine their ability to shoulder regulatory costs. Small and large entities possess different resources. A large business typically can absorb costs easier than a small business. A burdensome regulation might seriously affect a small business's decisions regarding product pricing, employment, research and development, and other factors that affect competitiveness. A costly regulation may unnecessarily drive a small entity out of business, when, at the risk of being repetitive, a less costly regulation would achieve the same objectives.

The Commission must describe cost factors, such as reporting requirements imposed on small business, as well as professional skills that are necessary to compliance.<sup>8</sup> Ideally, the IRFA would compare the relative costs imposed on small

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<sup>3</sup> See 5 U.S.C. § 603(a).

<sup>4</sup> *Id.*

<sup>5</sup> See 5 U.S.C. § 603(a)(3).

<sup>6</sup> 5 U.S.C. § 609(a).

<sup>7</sup> See 5 U.S.C. § 609(a)(3).

<sup>8</sup> See 5 U.S.C. § 603(b).

business to those imposed on large business; this would help the Commission determine whether a disproportionate impact falls on small business.

The RFA does not instruct the Commission to avoid burdening small business, but it does require the Commission to analyze a rule's burdens and study less-burdensome alternatives that are consistent with regulatory objectives.<sup>9</sup> This goal should be of particular importance to the Commission as it seeks to maximize competitive communications markets.

The Commission must describe significant alternatives that would accomplish a proposed rule's stated purpose while minimizing the significant economic impact on a substantial number of small entities.<sup>10</sup> This could include not regulating, or exempting small businesses entirely, or tiering the rules requirements. The RFA also requires discussion of four specific alternatives: different compliance requirements that take differing resources into account, clarification and simplification of compliance requirements, the use of performance rather than design standards, and exemption for small business.<sup>11</sup> The Commission should seek comment on these alternatives. Thus, it is appropriate for the Commission to include in its IRFA a detailed discussion of small business impact and alternatives, and not just simply bury a cursory reference to small business impact in an abbreviated and uninformative IRFA.

The Commission should view alternatives within the scope of its regulatory goals, because the RFA's purpose is not to reduce burdens on small business per se, but to reduce burdens consistent with the purpose of a proposed rule.<sup>12</sup> Advocacy recognizes that some rules may affect small business, and this is entirely appropriate. The RFA is not about giving unfair advantage to small business but is about efficient and balanced rulemaking. The RFA does not seek preferences for small business, but seeks a level playing field. The goal should be to avoid undue burdens and not to stifle competition and innovation. Advocacy suggests identifying alternatives as early as possible in the rulemaking process and actively consulting small business sector representatives to identify and prioritize a proposed rule's burdens and benefits.

The RFA does not define "significant impact" or "substantial number" of small entities. But some agencies have interpreted "significant impact" as a five percent effect on costs or revenues.<sup>13</sup> And at least one agency interprets "substantial number" as twenty

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<sup>9</sup> See 5 U.S.C. §§ 603(a), 603(c).

<sup>10</sup> See 5 U.S.C. § 603(c).

<sup>11</sup> See 5 U.S.C. §§ 603(c)(1)-(4).

<sup>12</sup> See 5 U.S.C. § 603(c).

<sup>13</sup> National Oceanic and Atmospheric Administration and the Department of Health and Human Services. Congress also provides examples of "significant economic impact": strong disincentive to seek capital or capital requirements out of a business's reach (See 126 CONG. REC. S10938, H24593 (1980) (SECTION-BY-SECTION ANALYSIS OF THE REGULATORY FLEXIBILITY ACT)), fine of \$500 for noncompliance (*Id.*, H24578), 175 annual hours of record-keeping (*Id.*, S10938), impact less cost-efficient

percent.<sup>14</sup> In any event, these terms should prompt Commission staff to think in an substantive manner about the regulatory impact on small business. Commission rulemakings often affect all or nearly all of a particular small business class. Yet the Commission rarely takes the next critical step of acknowledging the specific impact or discussing whether the impact is intended or appropriate.

## **2. Final Regulatory Flexibility Analysis**

Analysis of public comment or the Commission's IRFA should enable the Commission to explore whether a proposed rule would impose a significant burden on small business. When it promulgates its final rule, the Commission also must prepare a final regulatory flexibility analysis ("FRFA"), and publish it with the final rule.<sup>15</sup> The FRFA should evaluate the impact of the rule on small business and analyze alternatives that would minimize any significant impact on a substantial number of small businesses.<sup>16</sup>

The FRFA should describe and estimate the number of small businesses that the rule would affect.<sup>17</sup> If the Commission cannot provide an estimate of affected entities, it must explain why.<sup>18</sup> As a practical defense in case of judicial scrutiny, the Commission should be able to point to aggressive efforts it made to arrive at an estimate of affected small businesses. The Commission should not merely rely on facially inadequate internal data, but should consult outside sources for this information.

The FRFA should address any significant concerns raised in comments.<sup>19</sup> It should include a succinct statement of the need for and objective of the rule and a summary of significant issues raised in comments.<sup>20</sup> The Commission should assess these issues and explain whether it has modified its rule, from proposal to final, in response to these issues. If it has, the Commission should describe how.<sup>21</sup> The Commission must describe the final rule's record-keeping requirements and the skills and resources necessary to comply with them.<sup>22</sup>

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than other reasonable alternatives (*Id.*, H24595), regulatory costs that outweigh benefits. The House of Representatives also provides examples in its report on the RFA. *See* 126 CONG. REC. H8467 (1980).

<sup>14</sup> National Oceanic and Atmospheric Administration. Also, the RFA's legislative history suggests that "substantial number" could be less than half of an affected class of small business. *See* 126 CONG. REC. at S10941 and 10942 (1980).

<sup>15</sup> *See* 5 U.S.C. § 604.

<sup>16</sup> *See* 5 U.S.C. § 604(a)(5).

<sup>17</sup> *See* 5 U.S.C. § 604(a)(3).

<sup>18</sup> *Id.*

<sup>19</sup> *See* 5 U.S.C. § 604(a)(2).

<sup>20</sup> *See* 5 U.S.C. §§ 604(a)(1)-(2).

<sup>21</sup> *See* 5 U.S.C. § 604(a)(2).

<sup>22</sup> *See* 5 U.S.C. § 604(a)(4).

The FRFA should describe the steps the Commission took to minimize undue significant economic impact on small entities consistent with the rule's purpose.<sup>23</sup> The description of mitigating steps should include a discussion of the factual, policy, and legal reasons why the Commission chose one alternative over others.<sup>24</sup> It is insufficient for the Commission to simply state that it chose one alternative. It must clarify its analysis of each alternative and articulate significant reasons for opting for the rule it chose. This is not a step the Commission routinely takes.

### **3. Conclusion**

The IRFA must be an integral part of the Commission's work in addressing problems – not an afterthought – nor a separate step in crafting a regulation and analyzing its effectiveness. The Commission should conduct its regulatory flexibility analyses as part of its overall rulemaking process. The Commission should not prepare a proposed or final rule and then go back and prepare its IRFA or FRFA. The Commission should consider small business impact and alternatives as an integral part of its entire decision-making process. This analysis should be extensive enough that the Commission could prepare the IRFA by reviewing and summarizing ideas expressed in its notice of proposed rulemaking. And a FRFA should flow naturally from the IRFA and the Commission's reflection on opinions expressed by commenting parties.

We believe that the Commission staff's renewed attention to RFA will lead to heightened awareness within the Commission of the impact of rules on small business, and consideration, from the very beginning of a rulemaking, of possibly unintended consequences that may follow from regulatory action. From a practical point of view,

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<sup>23</sup> See 5 U.S.C. § 604(a)(5).

<sup>24</sup> *Id.*

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it will serve the Commission well to assure that its small business analysis is properly reflected in the public record.

Advocacy is confident that the cooperative efforts of our two agencies will lead the Commission to consider small business impact as a substantive part of its rulemaking process. We urge you to support this effort and lend your voice to a serious Commission commitment to improved compliance with RFA. In this spirit, please feel free to call upon us at any time for assistance in future compliance with RFA.

Respectfully submitted,

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cc: Commissioner Ness  
Commissioner Furchtgott-Roth  
Commissioner Powell  
Commissioner Tristani  
Francisco Montero